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SAFeway INC.

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

13 MICHAEL RODMAN, on behalf of himself  
and all others similarly situated,

14 Plaintiff,

15 v.

16 SAFEWAY INC.,

17 Defendant.

Case No. 3:11-CV-03003-JST (JCS)

**SAFeway'S STATEMENT IN SUPPORT  
OF PLAINTIFF'S ADMINISTRATIVE  
MOTION REGARDING SEALING OF  
DOCUMENTS PURSUANT TO CIVIL  
LOCAL RULES 7-11 AND 79-5 [ECF  
No. 244]**

The Honorable Jon S. Tigar

1 Defendant Safeway Inc. (“Safeway”) submits the following statement and accompanying  
2 Declaration of Brian Blackman (“Blackman Decl.”) in support of Plaintiff Michael Rodman’s  
3 (“Plaintiff”) Administrative Motion Regarding Sealing of Documents (ECF. No. 244). Pursuant to  
4 Civil Local Rule 79-5(d) and this Court’s Standing Order, Safeway has: (1) reviewed and  
5 complied with the Court’s Standing Order, (2) reviewed Civil Local Rule 79-5, (3) identified each  
6 document, documents, or portions of documents proposed to be sealed or redacted, and  
7 (4) identified the entity that has designated the materials to be sealed as confidential. All  
8 documents proposed to be sealed are those of Safeway itself, an ECF filer. As such, Safeway has  
9 not served this statement on any non-party that is not on ECF.

## 10 **I. BACKGROUND**

11 On March 2, 2015, Safeway filed its Motion to Decertify the Class (the “Motion”). *See*  
12 ECF. Nos. 238-242. Plaintiff filed his Opposition to Safeway’s Motion on March 23, 2015 (the  
13 “Opposition”). *See* ECF No. 244-245. In support of his Opposition, Plaintiff submitted the  
14 Declarations of Paul Manning (“Manning Declaration”) and Timothy Mathews (“Mathews  
15 Declaration”). ECF Nos. 245-1 and 245-8. The Mathew Declaration discusses several internal  
16 Safeway documents that were submitted under seal in connection with the Motion or as evidence  
17 in support of the parties’ summary judgment briefing. *See* ECF No. 245-1, ¶¶1-5. It also attaches,  
18 as Exhibits B-F, a number of internal financial records of Safeway.com. *See* ECF No. 245-3 to  
19 245-7. Safeway has designated these materials and information “Highly Confidential” under the  
20 terms of the Protective Order entered in this action. Plaintiff also discusses the content of these  
21 exhibits, as well as evidence both parties have submitted under seal in connection with the class  
22 certification and summary judgment briefings (ECF Nos. 120, 131, 137, 138 and 170), in his  
23 Opposition.

24 Safeway designated these documents and information “Highly Confidential” because they  
25 discuss and reflect Safeway.com’s pricing strategies, pricing methodology, highly sensitive  
26 financial information and internal business strategy (including internal communications regarding  
27 decision-making and business plans). *See* Declaration of Michael McCready (ECF Nos. 172-1  
28 and 179) (“McCready Decls.”), ¶¶4-7; Declaration of Brian Blackman (ECF Nos. 142, 186)

1 (“Blackman Decl.”), ¶¶4-8. These documents contain sensitive business and pricing information  
2 that is not generally available to the public and would be of significant value to Safeway’s  
3 competitors if released to the public. *See* McCready Decls., ¶¶4, 6-7; Blackman Decl., ¶¶4-8. In  
4 accordance with Civil L.R. 79-11(d), Plaintiff redacted information for his Opposition and the  
5 Mathews Declaration and lodged Exhibits B-F and the Manning Declaration for filing under seal  
6 and filed an Administrative Motion for a sealing order. *See* ECF No. 244. Safeway submits this  
7 Statement and the supporting Blackman Declaration in support of Plaintiff’s administrative motion  
8 to seal.

## 9 **II. ARGUMENT**

### 10 **A. References In The Opposition To Documents Previously Submitted Under** 11 **Seal**

12 Plaintiff seeks to seal portions of his Opposition that discuss materials the parties have  
13 previously filed under seal in connection with the class certification and summary judgment  
14 briefing. He also discusses materials that Safeway has lodge for filing under seal in connection  
15 with the Motion. The portions of Plaintiff’s Opposition discussing evidence previously submitted  
16 under seal reflect confidential information contained within that evidence, namely information  
17 concerning Safeway’s pricing strategies and methodology and Safeway’s internal business  
18 strategy and performance. As set forth below and in Safeway’s previously filed statement and  
19 declarations (ECF Nos. 122, 131, 142, 172, 179 and 238) in connection with the earlier  
20 proceedings, such information is properly sealable. The table set forth in paragraph 9 of the  
21 accompanying Blackman Declaration identifies: (1) those portions of Plaintiff’s Opposition that  
22 Safeway supports sealing because it discusses Safeway’s confidential information and strategies;  
23 (2) the evidence previously submitted under seal to which Plaintiff’s Opposition refers or  
24 discusses; (3) the previously filed proof submitted in support of the sealing applications; and (4)  
25 the Sealing Order. The portions of Plaintiff’s Opposition referencing and discussing this same  
26 information should also be sealed. *See* Blackman Decl., ¶9.

1           **B. Evidence Submitted For The First Time Under Seal**

2           In this district, a party seeking to file a document under seal must comply with a two-prong  
3 requirement. The party must “(1) comply with Civil Local Rule 79-5; and (2) rebut the [] strong  
4 presumption in favor of access that applies to all documents other than grand jury transcripts or  
5 pre-indictment warrant materials.” *Gaudin v. Saxon Mortg. Servs.*, 2013 U.S. Dist. LEXIS 82059,  
6 at \*2 (N.D. Cal. June 11, 2013) (Tigar, J.) (internal citations and quotations omitted). The first  
7 prong requires that the party seeking to seal the document establish that (1) “the document or  
8 portions thereof is privileged or protectable as a trade secret or otherwise entitled to protection  
9 under the law; and (2) is narrowly tailored to seek sealing only of sealable material.” *Id.* (citing  
10 Civil L.R. 79-5). “With respect to the second prong, the showing required for overcoming the  
11 strong presumption of access depends on the type of motion to which the document is attached.”  
12 *Id.* With regard to non-dispositive motions, “[a] court may, for good cause, keep documents  
13 confidential ‘to protect a party or person from annoyance, embarrassment, oppression, or undue  
14 burden or expense.’” *Id.* (quoting Fed. R. Civ. P. 26(c)). This court has held that a motion for  
15 class certification is a “non-dispositive” motion, and is thus subject to the lower “good cause”  
16 requirement rather than “compelling reasons” standard applied to dispositive motion. *Id.* at \*5.

17           The documents that Plaintiff proposes to file under seal in his Administrative Motion (ECF  
18 No. 244) satisfy both the first and second prong under Ninth Circuit law: (1) Plaintiff has  
19 narrowly tailored his request to seal documents or redacted portions of documents which are  
20 “privileged or protectable as a trade secret or otherwise entitled to protection under the law” and  
21 (2) there are “compelling reasons” for Safeway to not want this sensitive business information  
22 released to competitors or to the public.

23           **1. Business Strategy and Performance Documents**

24           “A trade secret is generally defined as information that (1) derives independent economic  
25 value from not being generally known to the public, and (2) is the subject of efforts to maintain its  
26 secrecy.” *La. Pac. Corp. v. James Hardie Bldg. Prods.*, 2013 U.S. Dist. LEXIS 94875, at \*6  
27 (N.D. Cal. July 8, 2013) (citing 18 U.S.C. § 1839(3); Cal. Civ. Code § 3426.1(d)). Documents  
28 dealing with a party’s internal business strategy and financial performance assessment are treated

1 as protected trade secrets for the purposes of a sealing motion. *See In re NCAA Student-Athlete*  
2 *Name & Likeness Licensing Litig.*, 2013 U.S. Dist. LEXIS 68611, at \*12 (N.D. Cal. May 13,  
3 2013) (sealing document that was “marked confidential,” and which “reveal[ed] the internal  
4 strategy and decision making process” where “disclosure could harm [the requesting party’s]  
5 competitive standing”); *Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. Dist. LEXIS 30562, at \*2  
6 (N.D. Cal. Mar. 6, 2012) (sealing “confidential business and marketing strategy,” which “was  
7 created at a significant cost to [the requesting party], and could be used by [the requesting party’s]  
8 competitors to its disadvantage, particularly because it discusses [the requesting party’s]  
9 customers”); *Muench Photography, Inc. v. Pearson Educ., Inc.*, 2013 U.S. Dist. LEXIS 115847, at  
10 \*11-12 (N.D. Cal. Aug. 15, 2013) (sealing document which contained information relating to  
11 requesting party’s “product development efforts and business strategies to competitors,” when  
12 “competitors could use these strategies themselves—strategies that [the requesting party] spent  
13 significant resources to create”).

14       The Manning Declaration discusses confidential customer transaction data. *See* ECF No.  
15 244-19. Exhibit B, C, D, E and F to the Mathews Declaration (ECF No. 244-8 to 244-17) reflect  
16 highly sensitive financial and performance information that is not generally known or shared  
17 outside of Safeway. *See* Blackman Decl., ¶¶8. This information is sealable under Civil Local  
18 Rule 79-5 as protectable trade secret and confidential business information.

## 19       **2.       There Are Compelling Reasons For Sealing This Evidence**

20       There are also “compelling reasons” to seal this information. *Gaudin*, 2013 U.S. Dist.  
21 LEXIS 82059, at \*5. In the first instance, Safeway takes steps to ensure all of this information is  
22 kept from the public. Blackman Decl., ¶5; *see also* ECF Nos. 172-1, ¶5 and 179, ¶5. Beyond this,  
23 the information is commercially sensitive and highly valuable to Safeway and has not previously  
24 been disclosed. Should information regarding Safeway’s financial performance, for instance,  
25 become available to Safeway’s competitors, such competitors could use the information to  
26 undercut Safeway, predict future strategies, or re-structure their pricing methodologies in a way  
27 that would be harmful to Safeway’s profitability. *See* Blackman Decl., ¶¶5, 10, ECF Nos. 172-1,  
28 ¶¶5, 7 and 179, ¶¶5, 7; *see also Stanislaus Food Prods. Co.*, 2012 U.S. Dist. LEXIS 176346, at \*6.

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Dated: March 27, 2015

By /s/ Brian R. Blackman  
BRIAN R. BLACKMAN  
Attorneys for Defendant  
SAFEWAY INC.